No. 80-5889

Office-Supreme Court, U.S.
FILED
JUN 1 1981
ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN SANTOSKY II and ANNIE SANTOSKY,
Petitioners,

—against—

BERNARDT S. KRAMER, Commissioner,
Ulster County Department of Social Services
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

BRIEF *AMICUS CURIAE* OF COMMUNITY ACTION FOR LEGAL SERVICES, INC., M.F.Y. LEGAL SERVICES, INC., AND BROOKLYN LEGAL SERVICES CORPORATION, A.

LOUISE GRUNER GANS
Community Action for Legal Services, Inc.
CATHERINE P. MITCHELL,
General Counsel
335 Broadway
New York, New York 10013
(212) 431-7200

M.F.Y. LEGAL SERVICES, INC.
NORMAN SIEGEL, ESQ.,
Project Director
759 Tenth Avenue
New York, New York 10019
(212) 581-2810

BROOKLYN LEGAL SERVICES, CORP. A
ARNOLD ROTHBAUM, ESQ.,
Project Director
260 Broadway
Brooklyn, New York 11211
(212) 782-6195

Attorneys for Amici Curiae

GARY CONNOR
LOUISE GRUNER GANS
DANIEL GREENBERG
CAROLYN KUBITSCHEK
JEAN SCHNEIDER
EDWARD N. SIMON

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Community Action for Legal Services, Inc., MFY Legal Services, Inc., and Brooklyn Legal Services Corporation A, respectfully move, pursuant to Rule 36 of this Court's Rules, for permission to file the within brief Amicus Curiae in Santosky v. Bernardt S. Kramer, Commissioner of Ulster County Department of Social Services, by reason of the Amici's substantial interest in the outcome of this case and their considerable experience in litigation concerning the issues presented herein.

The attorneys for all parties to this appeal have been requested to consent to the filing of this brief and Counsel for both Petitioner and Respondent have granted their consent.*

*Letters of consent have been filed with the Clerk of this Court.

INTEREST OF AMICI CURIAE

Community Action for Legal Services, Inc. is the largest civil legal services program in the nation. Funded by the National Legal Services Corporation as successor to the United States Office of Economic Opportunity (OEO) legal services program, CALS provides a full range of civil legal services to indigent New York City residents who cannot afford to pay a private attorney. CALS has a full time staff of over 121 attorneys, based in 21 neighborhood offices, who provide legal assistance to more than, 40,000 persons a year. CALS attorneys provide representation in all the trial courts in New York City, in the State and Federal Appellate Courts and in this Court. MFY Legal Services, Inc. and Brooklyn Legal Services, Corporation A,

are two of CALS' delegate corporations. Their neighborhood offices are located in the lower East Side and the West Side of Manhattan and in the Williamsburg section of Brooklyn, New York respectively. Both programs have an active family law practice.

Approximately 20% of the cases handled by CALS neighborhood legal services offices, including MFY Legal Services, Inc. and Brooklyn Legal Services Corporation A are in the area of family law. These cases include a significant number involving the termination of parental rights in the Family Court of the State of New York -- at least 1,000 cases since 1967.

Attorneys associated with CALS, as well as MFY Legal Services, Inc. and Brooklyn Legal Services, Corporation have handled many reported cases involving

termination proceedings and related areas of family law, including Smith v. Organization of Foster Families, 431 U.S. 816 (due process claims of foster parents in relation to foster children and their natural parents); Shelton v. Smith, 422 F. Sup.; 460 (E.D.N.Y. 1976) aff'd, 547 F. 2d 768 (2d Cir. 1976) (termination of visitation between parents and children in foster care without due process); Matter of Ray A.M., 37 N.Y. 2d 103 (1976) (termination of parental rights).

The constitutional question raised by the instant appeal, namely whether due process requires that a judicial order involuntarily terminaging parental rights must be supported by clear and convincing evidence is one of central concern to Community Action for Legal Services Inc., and its delegates. In fact attorneys from

MFY Legal Services, Inc. and Brooklyn Legal Services Corporation A have litigated this precise issue in the Family Court of the State of New York in Matter of Orzo, 84 Misc. 2d 482, 374 N.Y.S. 2d 534 (Fam. Ct., N.Y. Co., 1975); In the Matter of Marilyn H., ___ 2d Misc. 2d ___, ___ 436 N.Y.S. 2d 814 (Fam. Ct., N.Y. Co. 1981).

Accordingly, Amici wish to submit their brief because of their concern about the impact of this case on their clients and because they hope to be able to present to the court an analysis of the issues from the standpoint of the indigent parent which may not otherwise be presented.

Wherefore, Community Action for Legal Services, Inc., MFY Legal Services, Inc., and Brooklyn Legal Services, Corporation A respectfully request leave to file the attached brief as Amici Curiae.

Respectfully submitted,

LOUISE GRUNER GANS
Community Action for
Legal Services, Inc.
CATHERINE P. MITCHELL
General Counsel
335 Broadway
New York, N.Y. 10013

MFY LEGAL SERVICES, INC.
NORMAN SIEGEL, Project Director
759 Tenth Avenue
New York, N.Y. 10019

BROOKLYN LEGAL SERVICES,
CORPORATION A
ARNOLD ROTHBAUM, ESQ.
Project Director
260 Broadway
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BRIEF AMICUS CURIAE OF
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LEGAL SERVICES, CORPORATION A

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INTEREST OF AMICI CURIAE

The interest of Amici Curiae is set forth in the accompanying motion, supra.

STATEMENT OF THE CASE

This case is before this court as a result of the issuance of a writ of certiorari to review a decision of the Supreme Court of the State of New York, Appellate Division, Third Department, issued May 1, 1980, which affirmed the decision of the Family Court of Ulster County, New York, dated April 5, 1979. The Family Court found three of petitioners' children to have been permanently neglected by petitioners and ordered petitioners' parental rights to those children permanently terminated.

Petitioners, John and Annie Santosky, are husband and wife and the parents of five children. The oldest child, Tina Frances Apel, was found to have been neglected by her parents in 1973 and was placed in foster care. At the time of the Family Court's decision, she was seven years old and had been in foster care for five years. John and Jed Santosky, the

next two children, were found to be neglected in 1974 and were also placed in foster care. At the time of the hearing they were 5 and 4 years old and had been in foster care about four years. The Santosky's fourth child was born in 1978, and the fifth in 1979. The younger two children live at home with their parents, as they always have.

Throughout the period that the three older children have been in foster care, the Santoskys have visited them regularly, as often as the agency would allow. In 1977 the agency tried for a time to stop the visits on the grounds that they were confusing to the children, but the Family Court, on the Santosky's application, ordered the visits resumed. The Santoskys did apparently have trouble getting along with the various professionals who tried on behalf of the agency to help them. The workers claimed to find the

Santoskys passive, suspicious, and uncooperative.

On October 16, 1978 respondent filed a petition in the Ulster County Family Court seeking to terminate the Santosky's parental rights to the three older children on the grounds of permanent neglect. On March 12, 1979, after a fact-finding hearing, the Court found permanent neglect. On April 5, 1979, after a dispositional hearing, the court terminated the Santoskys' parental rights.

Petitioners appealed immediately to the New York Court of Appeals, on the sole grounds that New York's statute on termination of parental rights was unconstitutional in that it permitted a finding of permanent neglect upon a "fair preponderance of the evidence", rather than "clear and convincing evidence." On April 14, 1979 the Court of Appeals referred the appeal to the Appellate Division of the

New York Supreme Court, Third Department. The Appellate Division reviewed the record and them affirmed the Family Court's judgment, basing its decision solely on the constitutional issue. Petitioners' second appeal to the New York Court of Appeals was dismissed on September 16, 1980 on the grounds that the case presented no substantial constitutional question. Petitioners then petitioned this court for a writ of certiorari.

QUESTION PRESENTED

Whether Section 622 of the Family Court Act of the State of New York is unconstitutional under the Due Process Clause of the Fourteenth Amendment because it permits the Family Court to terminate parental rights on a finding of permanent neglect which is based upon a "fair preponderance of the evidence"

SUMMARY OF ARGUMENT

A proceeding for termination of parental rights results in the ultimate deprivation of a fundamental civil right: thr right of a parent to the "care, custodv, management and compdnionshio of her minor child" May v. Anderson, 345 U.S. 528, 533 (1953). Termination of parental rights has been likened to the death penalty.

The New York Family Court Act §§614, 622 and New York Social Services Law §384-b.7 provide for the termination of parental rights to a child upon a finding of "permanent neglect" supported by "a fair preponderance of the evidence."

The interests of both the parent and child in this termination proceeding derive from the constitutional right which attaches to the family unit.

The interests of the parent and child in their relationship to one another continue

and are not in conflict until after a finding of permanent neglect has been made and until then the State has no independent interest in termination.

The nature of the permanent neglect statute and the way it is applied makes the risk of an erroneous deprivation extremely high. The sources of this risk are the broad and indefinite terms of the statute, the imposition of the statute's requirements on a retroactive basis and the dichotomy which exists between permanent neglect as a legal construct and the real situation of parents and their children in the context of the malfunctioning foster care system.

Due process can only be satisfied in these proceedings by requiring a clear and convincing standard of proof. This Courts decisions fully support the conclusion that this standard must be applied.

DUE PROCESS REQUIRES A CLEAR AND CONVINCING STANDARD OF PROOF IN PROCEEDINGS FOR TERMINATION OF PARENTAL RIGHTS

A. INTRODUCTION

Petitioners contend that New York State has deprived them of all their fundamental rights as parents without due process of law. when if found that their children were "permanently neglected" on the basis or a mere "fair preponderance of the evidence." Amici are submitting this brief in order to assist the Court in making its assessment of

> first the private interest that will be affected by the official action, second the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

Amici believe that the "preponderance of the evidence" standard is constitutionally inadequate and that due process requires a "clear and convincing" standard of proof in proceedings for termination of parental rights.

B. THE NATURE OF THE PERMANENT NEGLECT PROCEEDING

New York Family Court Act §§614, 622 and New York Social Services Law §384-b govern the termination of parental rights to a child based upon "permanent neglect." Pursuant to Social Services Law §384-b.7 (a) a permanently neglected child is defined as

> ...a child who is in the care of an authorized agency and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, nonwithstanding, the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child.*

A finding of permanent neglect under this section need only be based upon "a fair preponderance of the evidence." F.C.A. §622,

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* The substantive law of permanent neglect is set out in N.Y.S.S.L. §384-b.7; the procedure in N.Y.F.C.A.; Article 6, Part 1, §611 et seq.

Matter of Orzo, 84 Misc. 2d 482, 374 N.Y.S. 2d 554 (Fam. Ct., N.Y. Co., 1975); Cf. Matter of Marilyn H. ___ Misc. 2d ___, 436 N.Y.S. 2d 814 (Fam. Ct., N.Y. Co., 1981). *

In considering the proof necessary for such a finding the courts need not limit the one year failure to plan or failure to maintain contact to any particular year. Matter of Shantal, 68 A.D. 2d 482, 483, 486, 417 N.Y.S. 2d 696 (1st Dept., 1979); Matter of Melanie, 76 A.D. 2d 1008, 1009, 492 N.Y.S. 2d 773 (3rd Dept., 1980); Matter of Marilyn H., supra. Similarly, the one year period need not be the year immediately preceding the filing of the petition. Matter of Jones, 59 Misc. 2d 69, 71, 297 N.Y.S. 2d 675 (Fam. Ct., N.Y. Co., 1969). Further, the failure to plan for and the failure to maintain contact with the child are considered in the disjunctive; either

* Following this finding a dispositional hearing is held, F.C.A.§623, to consider the child's best interest, without consideration of parental rights, F.C.A.§631.

is sufficient for a finding of permanent neglect In re Orlando F., 40 N.Y. 2d 103, 386 N.Y.S. 2d 64 (1976).

In considering whether a parent has maintained contact with his or her child, N.Y.S.S.L. §384-b.7(b) provides that the court need not find evidence of insubstantial or infrequent contacts by the parent sufficient, in and of itself, to preclude a finding that a child is permanently neglected. The statute does not, however, describe what constitutes the necessary contact other than to state

> A visit or communication by a parent with the child which is of such character as to overtly demonstrate a lack of affectionate and concerned parenthood shall not be deemed a substantial contract. S.S.L. §384-b.7(b).

And while the parent may be unable to visit his/her child because of distance and poverty, "the availability of public funds constitutes financial capability from the standpoint of 'permanent neglect'..." Matter of Marilyn H.,

supra; cf. Matter of Wayne T.D., 70 A.D. 2d 617 (2nd Dept. 1979). Similarly, a non-hospitalized mentally ill parent is deemed able to plan, regardless of the severity of the mental illness, Matter of Hime Y, 52 N.Y. 2d 242, 437 N.Y.S. 2d 286 (1981).

The statute defines planning as:

> ...to take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent...S.S.L. §384-b.7(c).

Such a plan must also be realistic and feasible and the Court may consider whether the parent failed to utilize services offered to him/her. S.S.L. §384-b.7(c).

While the New York court of Appeals has held that the standards to evaluate the adequacy of the parent's plans should not be set unrealistically high Matter of Orlando F., supra, some Family Courts have refused to to follow this injunction, Matter of Barbara P., 71 Misc.2d 965, 337 N.Y.S.2d 203 (Fam.Ct., N.Y. Co. 1972).

The Court in Matter of Coddington, 84 Misc. 2d 253 (Fam.Ct., Ulster Co.,1975) found a failure to plan where the mother obtained an apartment, but questioned her failed appointments for job training. Finally, a good faith effort to plan is not sufficient to defeat termination, S.S.L.§ 384-b.7(c).

Even if it is found that the parent failed to plan or to maintain contact with the child, the Courts must consider whether the foster care agency used diligent efforts to support and strenghthen the parental relationship, S.S.L. §384-b.7(a). Diligent efforts is defined by S.S.L.§384-b.7(f) as "reasonable attempts" by an authorized agency "to assist, develop and encourage a meaningful relationship between the parent and child" including, consultation with the parents in developing an appropriate service plan and providing visitation and services to facilitate discharge of the child from care.

It is unclear, however, to what extent

a failure to undertake diligent efforts by a foster care agency can defeat a finding of permanent neglect. Where an agency's sole focus was encouraging a child's attachment to foster parents, the New York Court of Appeals held that the lack of diligent efforts prevented a finding. Matter of Leon RR, 48 N.Y. 2d 117 (1979). But, the same court has found that a parent's severe sociopathology can warrant cessation of agency efforts after only 10 months. Matter of Ray A.M., 48 A.D. 2d 161 Aff'd 37 N.Y. 2d 619 (1975). Other Courts have permitted agencies to forego diligent efforts after less than a year of work, or for a period before the filing of a petition, because the chances that continued efforts would be productive were minimal Matter of Karas, 59 A.D. 2d 1022, 399 N.Y.S. 2d 758 (4th Dept., 1977). In sum, no clear standard exists to define to what extent a

foster care agency need provide diligent efforts and under what circumstances it may justifiably withhold services. And even where efforts are made by the foster care agency with a conviction that the efforts will not succeed, such efforts can be deemed sufficient. Matter of Sylvia Clear, 58 Misc. 2d 699 (Fam. Ct., N.Y. Co., 1969), rev.'d sub nom. Matter of Klug, 32 A.D. 2d 915 (1st Dept., 1969), pet. granted on rehearing, Matter of Sylvia Clear, 65 Misc. 2d 323 (Fam. Ct., N.Y. Co. 1970). Further, a petitioning agency need not be faultless in its services but only need provide those services that "on balance" meet its obligations. Matter of Orzo, supra. And in determining such balance the New York Court of Appeals has held that each case must be read upon the "particular facts and the totality of circumstances." In Orlando F., supra. See also, Matter of Derek Denlow, 87 Misc. 2d 910 (Fam. Ct., Kings Co., 1976).

C. THE INTERESTS AT STAKE

The parent's interest

A parent's right to the "companionship, care, custody and management" of his or her minor children has consistently been recognized as a fundamental liberty protected by the Due Process Clause of the Fourteenth Amendment. Stanley v. Illinois, 405 U.S. 645, (1972) Quilloin v. Walcott, 434 U.S. 246 (1978) Parental rights are part of a spectrum of fundamental rights to privacy and autonomy in family life including "marriage,procreation, contraception, family relationships and child rearing and education, "Roe v. Wade, 410 U.S. 113, 152 (1973) (citations omitted), Griswold v. Connecticut 381 U.S. 479, 495 (1965), that have long been held to be protected by the Constitution.

The parent's fundamental interest in his or her relationship with a child is

not diminished simply because parent and child are physically separated from each other by a divorce or by placement of the child in foster care. Smith v. O.F.F.E.R., 431 U.S. 816, 1977, May v. Anderson, 345 U.S. 529 (1953) Armstrong v. Manzo 390 U.S. 545 (1965). Parental rights derive not just from legal or physical custody but from blood relationship, and intrinsic human right. Smith v. O.F.F.E.R., 431 U.S. 816, 846 (1977).

Although custody is generally considered an important aspect of parenthood, Quilloin v. Walcott, 434 U.S. 246, 255,(1978) the biological relationship and the emotional ties which bind parent and child in this most basic of human relationships are of at least equal constitutional significance. Smith v. O.F.F.E.R., 431 U.S. 816, 843-844. The sense of connectedness, belonging, and responsibili actual or potential, which parents feel toward their children is an inherent part of the

parental relationship. It continues whether or not parent and child live together. The parent who has lost custody of his or her child does not stop feeling like a parent. The non-custodial parent's right to maintain a relationship with his or her children, to have access to them and contact with them, to preserve his or her identity as the child's mother or father, remains one of the "intrinsic human rights" which the constitution safeguards. Smith v. O.F.F.E.R., 431 U.S. 816, 845, Caban v. Mohammed, 441 U.S. 380, 385, Quilloin v. Walcott, 434 U.S. 246.

Because it is a final, absolute and irreversible deprivation of one of the most basic of human rights, termination of parental rights is among the most severe penalties which can be imposed upon an individual by the State. It is "extremely harsh" and "contrary to human instincts."

In the Matter of Peter John D.D., 48 A.D. 2d 956, 369 N.Y.S. 2d 232.

> The loss of a child...is a deprivation which can be equated with the imposition of a fine or imprisonment through criminal proceedings. Indeed it is not unlikely that many parents would choose to serve a prison sentence rather than to lose the companionship and custody of their children.

Davis v. Page, 618 F. 2d 374, (5th Cir. 1980). Imprisonment for a crime usually involves only a temporary loss of liberty. The termination of parental rights is, by its very nature, permanent. It is a kind of death penalty for parents. Catz & Kuelbs, The Requirements of Appointment of Counsel for Indigent Parents in Neglect or Termination Proceedings, 13 J. Fam. L. 223, 233 (1974).

The Child's Interest

The state may not argue that it is entitled to dilute the protections it affords parental rights in the name of "balancing" the interests of the parent against the private interests of the child. The interests of both parent and child in a termination proceeding derive from a single

source: the constitutional right, which attaches to the family unit as a whole, and not merely to its individual members, to enjoy family relationships free from state interference. Smith v. O.F.F.E.R. 431 U.S. 816, 850. The right to family integrity encompassses not only the right of parents to raise their children and enjoy their companionship, but also the reciprocal right of the children to be raised, nutured and educated by their parents. Duchesne v. Sugarman, 386 F. 2d 817, 824 (2nd Cir. 1977), Levy v. Louisiana, 391 U.S. 68 (1968), Alsager v. District Court of Polk County, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd 545 F. 2d 1137 (8th Cir. 1976). The child has as much to gain as the parent from preserving the family relationship, and as much to lose from its destruction.

The State of New York has recognized that "it is generally desirable for the child

to remain with or be returned to the natural parent because the child's need for a normal family life will usually best be met in the natural home." Social Services Law §384-b(1)(a)(ii) (McKinneys 1980).

This Court too has held that the "natural bonds of affection" between parent and child hold the child's best hope for the warm, nurturing, supportive upbringing which is truly in the child's best interests. Parham v. J.R., 442 U.S. 584, 602, Smith v. O.F.F.E.R., 413 U.S. 816, 850. The "affection and concern" of a parent are of tremendous value to a child whether or not the parent actually has custody of the child. Caban v. Mohammed, 441 U.S. 380, 389.

It is precisely because of our faith, as a culture, in the strength and value to children of the emotional ties within

the family that we afford such a high degree of deference and protection to the rights of family members to autonomy within the family unit. Wisconsin v. Yoder, 405 U.S. 205 (1972), Parham v. J.R., supra.

This court has rejected the suggestion that the child has an independent liberty interest in a stable family life which is separable from the interests of the family unit as a whole in remaining together. Smith v. O.F.F.E.R., 431 U.S. 816, 850. The argument that the state may use the preponderance standard to balance the right of the parent to raise the child with the child's right to a stable secure home rests on a number of fallacies.

First and foremost, it assumes at the outset that the natural family has broken down irretrievably. This is the very issue which the permanent neglect proceeding was created to decide. Until there has been a trial

and a judicial determination that a child has been permanently neglected, the state must make precisely the opposite assumption: that the interests of parent and child are the same, and that both have a stake in preserving their family ties. Parham v. J.R. 442, U.S. 584, 610. Any proceeding which, by its design, assumes before a showing of parental unfitness that parent and child are pitted against each other as adversaries intrudes impermissably upon the parent-child relationship. Id.

The second fallacy in the "balancing" argument is that it assumes that after termination of the natural parent's rights, an alternative stable adoptive home will be found for the child. Reality belies this assumption. In New York City in the year ending September, 1979, only about 12% of the children in foster care for whom the agency's goal was adoption were actually adopted. * Almost 40% of the foster children who had been freed for adoption through

termination proceedings of voluntary surrender were still waiting to be adopted, and many of those had waited for years.**

There is a third fallacy in the "balancing" argument. It confuses the issues before the court in the fact-finding stage of a termination (N.Y.F.C.A. §622) with those which arise at the dispositional stage (N.Y.F.C.A.§623). The court at fact-finding does not have before it the issue of where the child is going to live and be cared for after the termination. Under the New York Statute the court is in fact prohibited from considering the "adoptability" of the child when deciding a fact-finding. SSL §384(b)(3)(i).

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* Redirecting Foster Care, A Report to the Mayor of the City of New York, (1980), 69.

**Id. at 43. See also Children Without Homes, Children's Defense Fund (1978), 32.

At the dispositional stage, after there has been a finding of permanent neglect, the court may consider the child's need for a stable home and may "balance" the various alternative dispositions available to the child on an equal basis. The effect of the finding is that parental rights no longer have preferred status, N.Y.F.C.A. §631.

However at the time of the fact-finding hearing there has been no determination that the natural family has irretrievably stopped functioning in a way that benefits the child. At fact-finding, the court must afford to the natural family unit, parent and child, all of the deference and protection which the constitution guarantees and must begin with the presumption that the child's interests will be best served by maintaining his or her ties with

the natural parents.** Stanley v. Illinois, supra.

The State's Interest

This Court has recognized that the state has an interest in the proper upbringing of the children who live within its boarders and will grow up to be its citizens. Wisconsin v. Yoder, 406 U.S. 205, 213. At the same time, as we have discussed above, the Court has consistently held that the state serves its children best by supporting the institution of the family, not by intruding upon the family's realm in the name of "saving" children. The

** This firm dichotomy between the fact-finding and dispositional stages distinguishes this case from Quilloin v. Walcott, supra, and Caban v. Mohammed, supra. In those cases the fact-finding and dispositional functions were collapsed into a single proceeding which combined termination and adoption. Furthermore the cases involved a conflict between two natural parents. The issues, therefore, presented themselves in an entirely different posture.

state's primary interest in matters of child welfare must be the preservation, protection and support of the natural family. Stanley v. Illinois, supra.

Consistent with this rule, the State of New York asserts in its permanent neglect statute that its primary interest in this proceeding is in keeping natural families together wherever and whenever possible:

> "[T]he state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home."

Social Services Law §384-b(1)(a)(iii). The statute also says that the state has found that children are usually best cared for by their parents and that parents are entitled to care for their own children. Social Services Law §384-b(1)(a)(ii). New York would spite its own primary purpose were it to permit erroneous or unnecessary terminations of parental rights.

The New York statute also asserts, however, that some natural families cannot be preserved and protected without causing harm to their children and that in these cases, the state has an interest, as parens patriae, in dissolving the family in order to protect the interest of the child. Social Services Law §384-b(1)(a)(iv).

A state, in asserting its parens patriae interest, claims a right to stand in the shoes of a child's parents. But the state has no interest whatever in displacing the parent unless and until the parent has been shown to be unfit for continued parenthood.* Stanley v. Illinois, supra, at 657-658. Quilloin v. Walcott, supra, at 255.

*The precise substantive limits on the power of the state to terminate parental rights have not yet been defined by this Court. That was one of the issues not determined in Doe v. Delaware, 49 U.S.L.W. 4250(1981).

In New York, therefore, the state does not have a parens patriae interest in the termination until after a fact-finding hearing has taken place and the parents have been found to have permanently neglected their child. The state's parens patriae interest may not be balanced against the interests of the family at the fact-finding stage in order to arrive at the proper standard of proof because the parens patriae interest does not yet exist at this stage.

Finally, the New York statute asserts that the state has an interest in encouraging the adoption of children in foster care. Social Services Law §384-b(1)(b). This court has recognized that in some circumstances, the state has a legitimate interest in adoption in order to provide "homes to the homeless". Caban v. Mohammed, supra, at 390. It might therefore be a legitimate state interest at the dispositional

stage of a termination proceeding. At fact-finding however, the children involved in termination proceedings are not homeless. They still have a natural family, and the constitutional presumption that the natural family will best provide for them continues to attack to them. The state may not prefer adoption -- an artificial creation of the state, unknown at common law -- to the return of the child to the natural family until and unless the fact-finding court determines that the parents have permanently neglected the child. Stanley v. Illinois, supra.

Until and unless the fact-finding court makes a determination of parental unfitness, the interests of the parents, the child, and the state are all the same: the preservation, protection and support of the natural family.

D. THE RISK OF ERRONEOUS DEPRIVATION

Because of the nature of the permanent neglect statute, N.Y.S.S.L. §384-b.7; N.Y.F.C.A. §§611 et seq., the risk of error in proceedings for termination of parental rights on that basis is extremely high. The "fact-finding" determination required by N.Y.F.C.A. §622 is neither "sharply focused" nor "easily documented," Matthews v. Eldridge, 424 U.S. 319, 343.

The major sources of the risk of error are found in the language of the permanent neglect statute itself, in the imposition of the requirements of that statute on a retrospective basis, and in the gap which exists between permanent neglect as a legal construct and the real situation of parents and their children in the context of the foster care system.

1. The Language of the permanent neglect statute

All of the major elements of the definition of a "permanently neglected child,"

N.Y.S.S.L.§384.7(a)* depend for their meaning on criteria outside the statute itself and, within very broad limits, the criteria may be subjectively determined and applied by the judge to each individual case as he sees fit.

The definitions of "to plan for the future of the child" and of "diligent efforts" provided by S.S.L. §384-b.7(c) and (f) serve to illustrate this point.

In relevant part to "plan for the future of the child" is defined as "to take such steps as may be necessary to provide an

*The definition of "permanently neglected child," as provided in S.S.L. §384-b.7(a) requires consideration of six distinct elements: 1. the alleged failure of the parent "substantially, and continuously and repeatedly" to "plan for the future of the child;" 2. the alleged failure of the parent "substantially, and continuously or repeatedly" to "maintain contact" with the child;" 3. whether the parent was "physically and financially able" to "maintain contact" with or "plan for the future of the child;" 4. whether the child care agency made "diligent efforts to encourage and strengthen the parental relationship;" or 5. dispensed with such efforts because they would have been "detrimental to the best interests of the child;" and 6. whether the parental failure to "maintain contact" or "plan" lasted "more than one year following the date such child came into the care of an authorized agency."

adequate stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent. The plan must be realistic and feasible..." S.S.L. §384-b.7(c). What steps may be necessary, what is an adequate stable home, what is adequate parental care, what is a period of time that is reasonable, and what is a realistic and feasible plan are not spelled out by the statute and are left to the court to determine on the basis of unarticulated criteria.

Similarly the definition of the phrase "diligent efforts" leaves it to the invididual judge to determine what are "reasonable attempts" by an agency to "assist, develop and encourage a meaningful relationship between the parent and child." S.S.L. §384-b.7(f). Further, N.Y.S.S.L. §384-b.7(a) leaves it to the individual judge to determine,without any guidelines,whether such diligent efforts were

properly dispensed with by the agency as "detrimental to the best interests of the child." Each of these elements of the permanent neglect statute incorporates but leaves undefined standards for evaluating child care practices and parental attitudes and behavior toward their children.

It has been widely noted that when child placement decisions are based on indeterminate standards, the "decisions reflect the personal biases of judges and appear to result from a disapproval of parents' life styles rather than an impartial judgment that the child would be harmed." Developments in the Law-The Constitution and the Family, 93 Harv. L. Rev. 1156, 1318 n. 60 (1980), and that this is "especially risky when class difference confound the problem." Mnookin, supra at p.269.*

*The risk of error was illustrated by a study of the factors influencing a judge's decision whether to provide a child with services within the child's own home or to remove the child. Three judges asked to make that decision agreed on the disposition in only half the cases and "even in cases in which they agreed on the decision, the judges did not identify the same factors as determinative, each seeming to operate to some extent within his own unique value system." M. Phillips, A. Shyne, E. Sherman, & B. Haring, Factors Associated with Placement Decisions in Child Welfare, 69-84 (1971) at 84.

Indeterminate statutory provisions such as this have been criticized as intrinsically unfair* and as unconstitutionally vague, Doe v. Delaware, 49 U.S.L.W., 4250, 4251 (dissenting opinion, Mr. Justice Brennan); Alsager v. District Court of Polk Co., Iowa, 406 F. Supp. 10 aff'd 545 F. 2d 1137 (8th Cir. 1976); Roe v. Conn., 417 F. Supp. 769 (M.D. Ala. 1976; three-judge court). In applying the void-for-vagueness doctrine this Court has stated that

> "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. City of Rockford, 408 U.S. 104, 108-109.

*"The use of the indeterminate standard means that state officials may decide on the basis of unarticulated (perhaps even unconscious) predictions and preferences that could be questioned if expressed. Because of the scope of discretion under such a standard, there is a substantial risk that decisions will be made on the basis of values not widely shared in our society, even among judges." Mnookin Child Custody Adjudication: Judicial Functions in the Face of Inderterminancy, 39 Law & Contemporary Problems 226 (1975) 263.

This description of vagueness is also a description of risk of error. The risk of error through arbitrary and discriminatory enforcement inherent in the phrasing of the permanent neglect statute, N.Y.S.S.L. §384-b.7 may and must be recognized as patent and severe, whether or not the statute is unconstitutionally vague.

2. The imposition of the requirements of the permanent neglect statute retrospectively

In determining whether a child is a "permanently neglected child" the court not only makes a retrospective assessment "about the facts of some earlier event" In re Winship, 397 U.S. 358, 369-70 (1969), but it retrospectively determines, for the first time, what the parent should have done and did not do. In the course of a child's foster placement, parent and agency do not discuss the appropriateness of parental planning, the nature of the agency's diligent efforts, or whether the

diligent efforts will be dispensed with, except in the most casual fashion. The ongoing process of planning and diligent efforts are left to the separate subjective determination of parents and agency.

Although the permanent neglect statute places the burden and responsibility for planning on the parents, in Amici's experience most parents have neither knowledge nor understanding of the concept. Where a child is placed as a result of a child protective proceeding pursuant to FCA Article 10 no individualized notice of the planning requirement is given to the parent at all. In the case of voluntary placements, only recently have the voluntary placement agreements advised parents, albeit in conclusory fashion, that they have an obligation to "plan", N.Y.S.S.L. §384-a. See In the Matter of Roxann Joyce M., 99 Misc. 2d 390, 417 N.Y.S. 2d 396, (Fam. Ct., Kings Co., 1979),

rev'd 75 A.D. 2d 1872, 428 N.Y.S. 2d 264 (2d Dept., 1980).

The agency on the other hand, not only knows what planning is, but is required by law, (18 N.Y.C.R.R. 428. 3(d) and former 18 N.Y.C.R.R. 606.15), to have a written "plan" which in effect defines what the parents' planning efforts should be. Paradoxically, although parents and agency are required by S.S.L. §384-b.7(f)(1) to consult and cooperate in at least some aspect of planning, there is no requirement that the agency's written plan be given to parents. It is Amici's experience that parents are not usually, if ever, given a copy of the agency's own plan.*

Thus, from the outset, the agency has a concrete plan which defines what the parents

*18 N.Y.C.R.R. 428.3(d)(6) gives Social Services districts the option of reviewing the plan with the parent; it doesn't require disclosure of the plan.

are expected to do, but the parents, unaware of the plan or the agency's expectations are pursuing their own course of action.

This anomalous situation is repeated with respect to the agency's diligent efforts. The agency's plan describes the attempts the agency will make to support the relationship between parents and their children in foster care, [18 N.Y.C.R.R. 428.3(d)(3) and former 18 N.Y.C.R.R. 606.15(a)(2),(3),(4)]. The nature of the attempts are a matter of grace on the part of the agency. Amici are convinced on the basis of their experience, that parents are not told and do not know what kind of help the agency can provide and are not given a choice of help and services considered most desireable and suitable by them.**

**Several studies note the failure of social service agencies to "inform...families of available resources" and that "knowledge and use of existing services" by AFDC families was limited. Agency caseworkers themselves have been described as not sufficiently aware of public and private programs and resources available to many of their families. Redirecting Foster Care, A Report to the Mayor of the City of New York (1980) p.14, 33; 600,000 Children, a Report by Citizens' Committee of New York, Inc. (1978) p. 33)

Similarly, an agency decision to dispense with "diligent efforts" as "detrimental to the best interests of the child" is made by the agency unilaterally and is not communicated to the parent contemporaneously. There is no legal requirement that the parent be notified when that decision is made. Usually, in Amici's experience, it is only in the course of the permanent neglect proceedings that the decision is disclosed.

The danger inherent in the retrospective operation of the permanent neglect statute is that norms of planning and diligent efforts can and will be applied after the fact to achieve any desired result. The danger is a genuine one, as only one of the parties, the authorized agency, has effective control and possession of the facts by means of its contemporaneously kept case record (18 N.Y.C. R.R. 428.1, 428.3 and former 18 N.Y.C.R.R. 606. 13); the parent has no comparable evidence to document her version of reality.

3. The gap between the theory of permanent neglect and practice.

The permanent neglect statute, S.S.L. §384-b.7, as a basis for termination of parental rights, by relying on concepts of "planning" and "diligent efforts" attempts to translate certain social work concepts into a legal framework. It rests on a social judgment that parents of children in foster care must help to reunite their families through "planning"* and "that the community is not justified in terminating parental rights in the absence of 'abandonment' unless the community has, through the social agency, sought to reweld the parent-child relationship,"** by its "diligent efforts."

The theory of the permanent neglect statute may be an enlightened one. But it rests on assumptions as to the real situation of parents, children and agencies which cannot survive close scrutiny. The financial, physical and social

*Planning is a basis element of casework practice. Report, Barriers to the Freeing of Children for Adoption, The Temporary State Commission on Child Welfare (March 1976)
**Id. at 23

ability of the parents of children in foster care to maintain contact with them and to "plan" in the social work sense, for their future is far more circumscribed than the statute as written and interpreted allows. Authorized child care agencies are far more stingy in the provision of help and services to these parents than the statute requires.

Thus, in the typical permanent neglect case, the Family Court encounters parents who who are legally but not humanly able to plan and maintain contact and agencies who did not make any serious effort to help the parents. At the same time, the tendency of agencies to keep children in foster care for many years and the consequent estrangement of some of the children from their parents is used an an unwritten mandate for termination. This gap between permanent neglect as a legal construct and the realities which intrude on the actual proceedings, forces a distorted and unfair application of the permanent neglect statute.

As this Court has recognized, " the poor and victims of discrimination" resort to foster care placement in disproportionately large numbers. Smith v. O.F.F.E.R., 431 U.S.816,833. In New York City in 1979, more than 70% of the children in foster care came from families on public assistance,* and over 50% came from female-headed families.** Presently, 84% of the children in the city's foster care population come from minority backgrounds; 56.5% are black and 23% are Hispanic.*** In New York City a black child is three times as likely as a white child to be removed from his family; a Puerto-Rican is twice as likely.**** In New York State 62.2% of the children in foster care were from New York City.*****

*Foundation for Child Development, State of the Child: N.Y.C. II,(1980) 126.
**Redirecting Foster Care, A Report to the Mayor of the City of New York (1980), 6.
***State of the Child: N.Y.C. II,123
****Redirecting Foster Care, 6
*****Foster Care in New YorkCity, Child Welfare Information Service, Inc. (May-June,1978).

New York courts have held that a recipient of public assistance is deemed legally able to plan or visit under the permanent neglect statute, e.g. Matter of Orzo, 84 Misc.2d 482, 374 N.Y.S.2d 554 (Fam.Ct., N.Y. Co.,1975); Matter of Marilyn H., supra. However,for most parents struggling to survive on public assistance, this presumed ability to conform to the requirements of planning and visitation is a legal fiction.

New York's public assistance grant is wholly inadequate in helping families provide for their own needs.* The Consumer Price Index has increased 86% since 1972 when present assistance levels were set.** The non-shelter portion of the AFDC grant for a family of four is only $2.15 per day per person. A single mother whose children are in foster care would only be eligible for home relief and would receive $22.00 per week for basic needs exclusive

*Redirecting Foster Care,p.3
**Id..p.28

of shelter costs.* Moreover, the sharp increase in New York City housing costs forces a substantial number of welfare recipients to use part of their basis needs grant to supplement their maximum shelter reimbursement.**

Under these circumstances, it is almost impossible for parents on public assistance to maintain contact with their children in foster care and to plan in a manner that is "realistic and feasible" under S.S.L.§384-b.7(f).

In Amici's experience, securing appropriate housing is treated as an essential feature of an adequate plan. Yet, when children are placed in foster care, the parent's monthly rent allowance is automatically reduced, often requiring relocation to smaller quarters and causing loss of furniture. Parents are thus caught in the surreal position of not having adequate housing for the return of their children, although it was the children's absence the created the situation.***

*18 N.Y.C.R.R.§352.2
**State of the Child: New YorkCity II,p.60.
***Redirecting Foster Care,p.16.

Parents' financial plight affects their ability to visit their children, as well as to conduct activities considered part of planning. Programs and agency offices are generally not located in the City's poorest neighborhoods.*

The cost of public transportation in New York City ($1.20-round trip) is a substantial burden and can be more so in other localities.**

In addition to the required trips to the agency for visitation, parents must make numerous trips to their welfare center, for counselling sessions, medical and legal services, attendance at Family Court, or searching for decent housing or employment.

The difficulties in planning and visitation caused by the strain of financial circumstances are generally not ameliorated by the help from child care agencies.

*Redirecting Foster Care, p.6
** Report, Barriers to the Freeing of Children for Adoption, p.95

The failure of authorized child care agency staff to provide social work services needed by parents to resolve their problems and facilitate the return of children home, has persisted despite the "diligent efforts" requirement of S.S.L.§384-b.7. Cf. Smith v. O.F.F.E.R., 431 U.816, 833-834. Numerous reasons for the failure have been noted.

A majority of New York Family Court Judges have reported that

> "agencies do not make permanent plans for children in foster care. not try sufficiently to reunite the parent and child. They cite: the failure of agencies to encourage and cooperate in parental visitation: agency failure to assist parents with their problems; the cultural and socio-economic differences between middle-class social workers and underprivileged parents: the bias of some workers against the parents; the conviction of some caseworkers that the interests of children are better served in foster care than in their parents' home. " Report, Barriers to the Freeing of Children for Adoption, supra, p.90.

The reluctance of agencies to develop plans for reunification of children with their

families is in part a reflection of the unavailability of necessary services. Another factor, however, is that the agency may be reluctant to lose the foster care reimbursement payments, which will stop if the child leaves foster care and returns home. The financial implications of decisions with regard to children in foster care are frequently determinative.*

In addition to the class bias noted by the Family Court Judges, racial bias pervades the foster care system, seriously disadvantaging natural parents in termination proceedings under the statutory design.

> "...racism manifests itself in the kinds of services available, the location of the service agencies, the inequitable treatment of minority children within foster care, and the small number of Black and Hispanic directors and staff in child care agencies.**

* Children Without Homes, (Children's Defense Fund, 1978),pp.24-25; The Children of the State II, Annual Report 1976 of the Temporary State Commission on Child Welfare (1976)p.19

** Redirecting Foster Care, p.6

The gap between the legal requirements of the permanent neglect statute and the realities of what parents can do and what help agencies can provide creates intolerable dilemmas for Family Court judges who must apply the statute.

Given the fact that the vast majority of children who are the subject of permanent neglect proceedings have been in foster care for many years, and, are torn between conflicting loyalties to their parents and foster parents, judges are reluctant to leave children in the "limbo of foster care." Consequently, they tend to exaggerate the failure of the parents to plan or maintain contact, and to minimize the agencies' failures to comply with the diligent efforts requirement. They terminate parental rights even as they castigate the agencies. This process of accommodation is discernible from the cases. Matter of Suzanne Y., 92 Misc.2d 652, 401 N.Y.S.

2d 383 (Fam.Ct., N.Y. Co.,1977); Matter of Joyce A.R., 52 A.D.2d 882, 383 N.Y.S.2d 58 (2nd Dep't. 1976); Matter of Donna Doreen G., 70 A.D.2d 188, 420 N.Y.S.2d 576 (3rd Dep't. 1979); Matter of Lisa Ann U., ___A.D.2d___, 427 N.Y.S.2d 994 (3rd Dep't. 1980).

This kind of distorted application of the permanent neglect statute further heightens the risk of error in these proceedings to terminate parental rights and supports the need for a higher standard of proof.

E. THE PROCESS THAT IS DUE

This court drew a clear connection between the standard of proof and the risk of erroneous determinations in Addington v. Texas, 441 U.S. 418, 427 (1978): "Increasing the burden of proof is one way to impress the fact-finder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate [decisions will be made]." The same point was made by Mr. Justice Harlan in his concurring opinion In re Winship, 397 U.S. 358, 369-370 (1969).

> [A] standard of proof represents an attempt to instruct the fact-finder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. Although the phrases "preponderance of the evidence" and "proof beyond a reasonable doubt" are quantitatively imprecise, they do communicate to the finder of fact different notions concerning the degree of confidence he is expected to have in the correctness of his factual conclusions.

Justice Harlan noted that in criminal cases it is of transcending importance that innocent persons not be punished. Therefore the reasonable doubt standard is used even though it increases the likelihood that guilty men may go unpunished, because the risk of erroneously convicting an innocent person is viewed as far more serious than the risk of erroneously acquitting a guilty one.

The "preponderance of the evidence" standard, applied in most civil cases, requires only a finding that the contested fact is more probable than not. In re Winship, 397 U.S. 358, 371 (Harlan, J., concurring); McCormick, Handbook on the Law of Evidence 339, at 793-794 (1972). At least one study has shown that preponderance of the evidence means about a fifty-five percent probability.* This court

*Simon, Rita James and Linda Mahan, "Qualifying Burdens of Proof; a View from the Bench, the Jury, and the Classroom," 5 Law and Society Review 319, 325 (1971).

has found that in applying the preponderance standard the trier of fact makes a finding by merely weighing the quantum of the evidence. In re Winship, supra, at 367. The preponderance standard is used in ordinary civil suits because:

> In a civil suit between two private parties for money damages, for example, we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor.

Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 50, (1971).

Applying these considerations to termination of parental rights mandates the use of a higher standard than mere preponderance of the evidence. These lawsuits are not merely cases between two civil litigants over money. Instead the State is attempting to sever all ties between parent and child permanently and irrevocably, to end forever the relationship which

our society deems to be fundamental to the healthy nurturing of its young. Smith v. Organization of Foster Families, 431 U.S. 816; Stanley v. Illinois, 405 U.S. 645, (1972). The consequences to a parent of an erroneous termination of parental rights are of horrifying magnitude.

The consequences of an erroneous determination not to terminate parental rights are far less drastic: the child usually remains in foster care, in the same location and with the same caretakers. The agency must continue to work with the parent. The parent may change his or her behavior and thus regain custody of the child. If not, the agency may bring a new proceeding to terminate parental rights based on new charges.

Obviously, the harm to the parent whose rights are erroneously terminated is far greater than the harm to the state when parental rights are erroneously preserved.

> "The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state."

Addington v. Texas, supra, at 427. The state must, therefore, prove a termination case by evidence "more substantial than a mere preponderance of the evidence." Id. at 427.

In addition to having less to lose, the state has an easier time proving its case in a termination proceeding than the parent does. Foster care agencies have social workers and other professionals who meet with both parents and children, keep business records of their contacts, and record long-term and short-term plans for parents and children. 18 N.Y.C.R.R. 441.14. The parents have neither professional expertise nor written records of their experience through what may be years of foster care. It is appropriate, therefore to put the heavier burden on the state, since it has more

evidence and expertise at its disposal. Cf. Duchesne v. Sugarman, 566 F. 2d 817, 828, (2d Cir. 1976).

The "clear and convincing evidence" standard of proof is a standard between the preponderance standard used in regular civil cases and the "beyond a reasonable doubt" standard employed in criminal cases. Addington v. Texas, 441 U.S. 418, 423-424 (1979). This standard is used to protect "particularly important interests in various civil cases." Id. 424. This court has repeatedly held that when basic constitutional rights are at stake, the party seeking to interfere with the exercise of those rights, may do so only upon a showing, by clear and convincing evidence, that such interference is warranted. Thus, in Addington v. Texas, 441 U.S. 418 (1979), this Court held that a person can be civilly committed to a mental institution only upon

a showing by clear and convincing evidence that such a deprivation of liberty was necessary. The reasons for this standard were the "weight and gravity" of the individual interest, Id. at 427, the "significant deprivation of liberty," Id. at 425, the "adverse social consequences," and "stigma" the individual would suffer, Id. at 426.

Similarly, in deportation proceedings, this Court has held that because of the precious right at stake, the right to remain in this country, the government must prove its case against the individual by clear and convincing evidence, Fedorenko v. United States, ___ U.S. ___, 101 S. Ct. 737 (1981); and "great tolerance and caution are necessary" in examining the individual's actions before he may be "deprived of the cherished status." Knauer v. United States, 328 U.S. 654, 658, (1946).

In denaturalization cases, a high degree of proof is also required. In Vance v. Terrazas, 444 U.S. 252 (1980) this court ruled

that the standard of proof need not be clear and convincing evidence only because the statute contains its own strict substantive standard of proof: in order to strip a citizen of his citizenship the government must prove that he intended to forego his citizenship. The requirement that specific intent be proved, this Court held, is a sufficiently strict standard to protect individuals from improper or unwarranted deprivations of citizenship. 44 U.S. at 427. In termination of parental rights proceedings, specific intent to forego parental rights need not be proved. On the contrary, the statute explicitly makes parental intent immaterial. Social Services Law §384-b(6)(b).

Furthermore, in a case to terminate parental rights, fundamental constitutional rights are at stake. The right to raise a family is amongst the most prescious rights protected by the Constitution, Stanley v. Illinois, 405 U.S. 645, (1972). A termination of parental rights

under Social Services Law §384-b does not merely impinge on that right, it eliminates it permanently. Because this statute so drastically interferes with so prescious a right, termination of parental rights requires proof by clear and convincing evidence.

The proponents of the preponderance standard assert that a higher standard would be inappropriate because it would not take into account the presence of another party to termination proceedings, the child. It must be noted, however, that Amici do not argue that the criminal standard -- beyond a reasonable doubt -- should apply. The middle standard of clear and convincing evidence is itself a compromise. In fact, in Addington v. Texas, 441 U.S. 418, 429 (1978), this Court applied the clear and convincing standard to a situation in which it recognized competing individual interests, as well as the interest of the State, at stake, namely, the interest

of the individual not to be deprived of his liberty, and the interest of a person suffering from a debilitating mental illness in obtaining necessary treatment.

Perhaps the greatest benefit to be derived from requiring a higher standard of proof in termination cases is the potential effect of the standard on the behavior of foster care agencies. These agencies are in control at all stages of foster care. Their inaction at the beginning of foster care placement leaves children in placement too long and makes it increasingly difficult to reunite with their families. (See, Goldstein, Joseph, Anna Freud, and Alfred Solnit, Beyond the Best Interests of the Child.)

Nonetheless, Amici reject categorically the inherent fallacies that underlie the assertion that the child's interests differ from the parents at the fact-finding stage of a termination proceeding. (See Section C, supra.)

By its decision in this matter this Court can signal its refusal to accept the agencies' inaction. The result would be an unequivocal statement that the State must work to reunite families and that anything less than meeting a high burden of proof will not suffice. Such a ruling would motivate the agencies to offer concrete services to alleviate the problems which caused the children to go into foster care and to speed their return home in every case where that is possible, because this Court has ruled that society cannot tolerate the erroneous termination of parental rights.

CONCLUSION

For all of the foregoing, the judgment of the Supreme Court of the State of New York Appellate Division, Third Department should be reversed.

Dated: May 28, 1981

LOUISE GRUNER GANS
Community Action for Legal
Services, Inc.
CATHERINE P. MITCHELL,
General Counsel
335 Broadway
New York, N.Y. 10013

M.F.Y. Legal Services Inc.
NORMAN SIEGEL, ESQ. Project Director
759 Tenth Avenue
New York, N.Y. 10019

Brooklyn Legal Services,
Corporation A
ARNOLD ROTHBAUM, ESQ.
Project Director
260 Broadway
Brooklyn, N.Y. 11211